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IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. 656

CITY OF HASTINGS, NEBRASKA, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,
KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Intervenor*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR INTERVENOR IN OPPOSITION

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OPINIONS BELOW

The Opinion and Order of the Respondent, Federal Power Commission (Petition, Appendix, pp. 11-33), is reported at 12 FPC 3, and 98 P.U.R. (N.S.) 1. The opinion of the United States Court of Appeals for the District of Columbia Circuit and the dissenting opinion (Petition, Appendix, pp. 34-53), have not yet been reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTE INVOLVED

The statute involved is the Natural Gas Act (Act of June 21, 1938, ch. 556, 52 Stat. 821, as amended by Act of February 7, 1942, ch. 49, 56 Stat. 83, and Act of July 25, 1947, ch. 333, 61 Stat. 459, 15 U.S.C. §§ 717 *et seq.*) principally Section 1(b) of that Act, set forth in the Petition at page 2.

QUESTION PRESENTED

Whether the Court below erred in refusing to set aside the determination of the Federal Power Commission that it had no jurisdiction, on the facts presented, over the sale by Kansas-Nebraska Natural Gas Company, Inc., to the City of Hastings, Nebraska, of gas for consumption by the City in the City's own electrical generating plant because it was a separately identifiable direct sale to the consumer for its own use rather than a sale for resale.

REASONS FOR DENYING THE WRIT

This Court should decline to issue a writ of certiorari because: (1) There is no conflict between the decision of the Court of Appeals in this case and the decisions of any other Courts of Appeals or of the Supreme Court; (2) This case involves no important Federal question; and (3) On the merits, the issues involved in this case were correctly determined by the Federal Power Commission and the Court of Appeals.

STATEMENT OF THE CASE

In view of "the decisive importance of the physical facts and the historical arrangement among the parties" (Petition, Appendix, p. 35), the Federal Power Commission (the Commission) and the Court of Appeals described the facts

of this case in substantial detail. Respondent relies on those descriptions for a more detailed statement than is given here or in the course of its Argument.

Kansas-Nebaska Natural Gas Company (Kansas-Nebraska) is a "natural gas company" within the meaning of the Natural Gas Act (the Act). It makes two types of interstate sales: *direct sales* to numerous industrial *consumers* for their own consumption and sales to *distributors* for *resale* to ultimate consumers, which are regulated by the Federal Power Commission. The City of Hastings, Nebraska (the City) is both a *distributor* and a *consumer* or *direct user*.

All of Kansas-Nebraska's sales to *distributors* for *re-sale*, including the sales for re-sale to the City, are governed by a single Rate Schedule G-1, filed with the Commission (Joint Appendix, p. 93). All of Kansas-Nebraska's sales to industrial consumers, including its *direct sales* to the City for use in its own power plant, are made pursuant to separate direct sale contracts. The direct sale contract with the City provides the same terms and rates as the direct sale contracts in effect between Kansas-Nebraska and every other similar industrial consumer within the State of Nebraska. (Intervenor's Appendix, pp. 12-13).

In operational and legal fact, Kansas-Nebraska and the City have always dealt separately with the gas purchased for re-sale and the gas purchased by the City for use in its own power plant. As found by the Commission, for over 10 years, substantial quantities of power plant gas have been separately treated for rate purposes, separately negotiated and contracted for, separately measured and separately billed. Since 1948, Kansas-Nebraska has paid the City a transportation charge for carrying the power plant gas from the point of delivery through the City's lines to the power plant.

Prior to the instant dispute, there was never any question about the fact that the direct sales for the power plant were not subject to the Commission's jurisdiction. There

has never been, and is not now, any question about the fact that the gas purchased by the City for re-sale is subject to the Commission's jurisdiction, which is still being effectively exercised.

The present dispute arose after Kansas-Nebraska adopted, following a preference stated by the Commission, (Intervenor's Appendix, p. 12) a contract demand type of arrangement[1] with all of its distributors, including the City, *on its sales for re-sale.* The coverage of the contract demand rate schedule was made precise for all of Kansas-Nebraska's *re-sale* customers by a specific provision in the rate schedule that it did "not apply to gas used or consumed by Utility [the City] for industrial purposes." (Joint Appendix, p. 97).

The City opposed the adoption of the contract demand arrangement. After the Commission permitted this type of rate schedule to become effective, the City signed the contract demand type of sale for re-sale contract and, thereafter, a separate contract for the gas used in the power plant, as it had always previously done.

Still later, the City exercised its right to terminate the direct sale contract.[2] Since that termination, the City has continued to take gas from Kansas-Nebraska for use in its power plant, with full knowledge of Kansas-Nebraska's advice to the City that gas for the power plant could be purchased only on the terms of the pre-existing separate power plant contract (Joint Appendix, pp. 83-85). The City contends, notwithstanding this advice and notwith-

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[1] Generally speaking, the contract demand type of arrangement obligates the supplier to have available at all times facilities adequate to supply a stated amount of gas, the amount being based on a study of the purchaser's probable maximum *firm* needs under extreme climatic conditions. For this service and investment by the supplier, the purchaser pays a fixed fee plus an additional fee for the gas actually used.

[2] Kansas-Nebraska contends that an attempted termination prior to July 1, 1950 was ineffective. The precise date of effective termination is not material for the purposes of this Petition.

standing the specific language in the rate schedule excluding gas sold directly to the City for use in its own power plant, that all of the gas taken by it for the power plant since the termination of the seprate power plant contract has been purchased under the re-sale contract and is therefore subject to the Commission's jurisdiction.

In collateral litigation, the United States District Court for the District of Nebraska has determined, as a matter of contract law, that the City is liable to Kansas-Nebraska for all power plant gas taken after termination of the power plant contract, according to the terms of that contract. This decision is now pending on appeal before the United States Court of Appeals for the Eighth Circuit.

ARGUMENT

I

There is No Conflict of Decision

The City does not claim that the decision below is in conflict with the decisions of any other Court of Appeals on the same matter or is in conflict with applicable decisions of this Court. No such assertion could be made.

As pointed out in the majority opinion of the Court below (Petition, Appendix, pp. 23-26), there is no conflict among the circuit courts and the Commission's determination is in accord with criteria found in decisions of this Court.

II

There is No Important Question of Federal Law

The Order of the Commission, affirmed by the Court below, applies only to the particular facts in this case, i.e., the long history of separate negotiations, separate contractual arrangements and obligations, separate measurement and consumption, separate payment and the complete independence of the direct sale for power plant use from the sale for re-sale—as these circumstances have existed

for more than a decade between Kansas-Nebraska and the City. The Commission took care to point out in its opinion that these particular facts constituted "the distinguishing circumstances here," and further noted that the methods used here in separating the sale of the power plant gas in no way precluded or interfered with the Commission's exercise of its rate authority over the sale for re-sale of the distribution system gas.[3] (Petition, Appendix, p. 43). Such authority is effectively exercised today. Therefore, the decision of the Court below does not involve a definition or interpretation of *general* application under Section 1(b) of the Act. Accordingly, there is no important question of Federal law requiring decision by this Court.

Contrary to the City's contention, the decision below does not give countenance to any so-called "end-use" theory (allegedly rejected "on other occasions") that "retroactively" affects the Commission's jurisdiction after completion of the sale. The Commission, on substantial evidence, found that the power plant gas was the subject of a separate direct sale to the consumer, and was not gas sold originally under a re-sale contract and subsequently devoted to power plant uses. (See, especially, Petition, Appendix, pp. 41-43.) The dissenting judge ignored the Commission's findings in this respect. (Petition, Appendix, p. 31).

III

The Commission's Determination as Affirmed by the Court Below Was Correct

The Natural Gas Act confers regulatory authority on the Federal Power Commission over "the sale in interstate commerce of natural gas *for resale for ultimate public consumption* for domestic, commercial, industrial, or any other use" and specially provides that the Act *"shall not apply to any other . . . sale of natural gas. . . ."* (Emphasis sup-

[3] The Petition's unsupported assertion (p. 8) of findings of jurisdiction upon "substantially" identical facts in other cases ignores the separability of the direct sales found to exist in this case.

plied). "Direct sales for consumptive use of whatever sort were excluded" from the Commission's power to regulate. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 332 U.S. 507 (1947).

In a case of this nature the ultimate question is whether particular sales in a particular factual setting are sales "for resale" or whether they are sales for direct consumption by the purchaser. *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 185 F. 2d 357 (3rd Cir. 1950). The Commission, the expert body entrusted by Congress with the authority to make this decision in the first instance, has determined that on the particular facts of this case Kansas-Nebraska's sales to the City of gas for use in its own power plant were direct sales and are not sales "for resale." The Court of Appeals has affirmed the Commission's findings and conclusions.

Kansas-Nebraska submits that even if the Commission's experience and ability were disregarded, the Commission's decision would be affirmed on the merits.

On the particular facts of this case, the Commission correctly found and concluded that gas sold by Kansas-Nebraska to the City for use in its own power plant is and historically has been sold separate and distinct from gas sold to the City for resale. For ten years prior to the present dispute, Kansas-Nebraska regularly sold to the City for its own use in its power plant substantial quantities of gas. At the same time, and always under separate negotiations, contracts, rates, billings and measurement, Kansas-Nebraska sold gas to the City as a distributor, which the City resold through its distribution lines to the ultimate consumer. The resale and the direct sale gas have only one point in common: both the resale and direct sale gas arrive commingled at a town border station where delivery is made to the City. Kansas-Nebraska pays to the City a transportation charge for transporting the power plant gas in the City's mains from the town border station to the plant. No such charge is paid on account of the resale gas. The power plant gas is separately metered on meters in-

stalled and maintained by Kansas-Nebraska at the power plant for that purpose. (Joint Appendix, p. 74).

Mere physical commingling at the point of delivery does not, contrary to the City's contention, make all sales—both direct and resale—sales for resale where there is a long history of substantial and separate sales for direct consumption, where the quantities of such consumption are easily and separately measured and where the parties have always regarded such sales as being governed by separate contractual arrangements. Physical commingling is material, if ever, only where the Commission cannot exercise its regulatory authority over the quantity of gas sold for resale without at the same time exercising its authority over the sale of all the gas delivered in bulk, where the operational arrangements prevent any practical separation or measurement of the direct sales, and where the buyer and seller treat *all* the gas delivered as part of the sale for resale. These are not the facts in this case.[4]

Even the dissenting judge apparently conceded the validity of this jurisdictional distinction between direct and resale gas (Petition, Appendix, pp. 32-3), and acknowledged that "as an engineering proposition 'accurate measurement of the volume resold and the volume directly consumed . . . is possible for each billing period.'" (Petition, Appendix,

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[4] In *United States* v. *Public Utilities Commission of California*, 345 U.S. 295 (1953), this Court declined to rule that mere physical commingling brought all sales within the Commission's jurisdiction. While the Court also refused to hold, on the record before it, that the direct and resale uses involved therein were separable, it indicated that on an appropriate record it would consider relevant such things as separate measurability of volume, separate rates, negotiations and contracts. *Id.* at p. 318. All of these factors are present in the instant case.

In *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357 (3rd Cir. 1950), the Court unanimously held the Commission to be without power to compel Colorado Interstate to file a single rate schedule covering all of its gas sales to intervenors where part of the gas sold was used in intervenors' own power plants. The Court pointed out that if the gas so consumed was not in fact the subject of a sale for resale, the Commission would lack the power to regulate its sale. The record in the *Colorado Interstate* case did not permit a resolution of that question.

p. 32). He argued, however, as does the City, that since July 1, 1950, when the City terminated the direct sale contract, "the only contractual arrangement under which Kansas-Nebraska has supplied Natural Gas to the City" is the resale gas contract. (Petition, Appendix, p. 29).

This erroneous conclusion of the dissent is based on several incorrect factual and legal premises.

First, Kansas-Nebraska has never agreed, prior or subsequent to July 1, 1950, to furnish gas to the City for power plant purposes under the resale contract. It has consistently advised the City that any gas used for the power plant was available solely under and on the terms of the direct sale contract explicitly in effect prior to July 1, 1950. By continuing, among other things, to take and use gas knowing of Kansas-Nebraska's offer, the City has continued in effect the terms of the direct sales contract. In collateral litigation, this point has been determined in Kansas-Nebraska's favor as a matter of contract law by the United States District Court for the District of Nebraska. An appeal from that judgment is now pending before the United States Court of Appeals for the Eighth Circuit.

Second, the dissenting judge and the City argue that the contract demand type of arrangement which prevails between the City and Kansas-Nebraska (and all of its other distributors) on resale gas gives the City the right to take resale gas for use in its power plant at least, apparently, up to an amount which, when added to the City's resale gas equals the amount nominated by the City under the contract demand agreement.

This argument contradicts, however, the specific provision in the resale rate schedule, and contract for the gas for resale, still in effect, that:

> "This rate schedule . . . shall not apply to gas used or consumed by Utility [the City] (or any of its Departments) for industrial purposes."

Even if contract demand gas may be taken for interruptible uses generally (such as the power plant) it cannot be taken for an interruptible use (such as the power plant) specifically prohibited by the contract demand rate schedule and contract.

The purpose of a contract demand arrangement is to assure the purchaser enough gas to meet the emergency needs of its *firm* re-sale customers. As the City says in its Petition, the volume nominated in the contract demand is "based solely upon the needs of [its] firm gas customers" without any allowance whatsoever for the requirements of interruptible users. (Petition, p. 6). Thus the contract demand arrangement does not permit the City to purchase on every day *or on any day* it chooses up to the total amount of the contract demand beyond the requirements of its *firm* resale customers.[5]

In summary, the petition for a writ of certiorari should be denied because the Commission has correctly found and concluded, on the facts of this case, that Kansas-Nebraska's sales to the City for *direct consumption* in its power plant are separate and distinct from Kansas-Nebraska's sales to the City for *resale* to the consuming public.

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[5] The dissenting judge premised his argument in part upon two additional factual errors: (1) The change from a straight commodity form of rate to the contract demand type of contract was "insisted upon by Kansas-Nebraska." (Petition, Appendix, pp. 29, 33) In fact, the contract demand form was adopted pursuant to a preference expressed by the Commission. (Intervenor's Appendix, p. 12) (2) Since July 1, 1950, "all gas supplied by Kansas-Nebraska to the City has been within the amount the City was required to nominate as probably needed for its firm resale customers." (Petition, Appendix, pp. 29-30) The fact is that on at least two occasions the total gas taken by the City, including the power plant gas, substantially exceeded the nomination under the contract demand (see Item 18 of Stipulations, Joint Appendix, p. 18).

CONCLUSION

For the foregoing reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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Q. Before we go on, did the staff prefer the contract demand form the contract?[1] A. They so indicated.[2]

Q. And did you prepare it, based upon that case? A. I did.

Chief Presiding Examiner: Indicated in what way? Did they say so?

The Witness: I am sorry, sir——

Chief Presiding Examiner: You say the staff indicated something. My question is how did they indicate it, did they say so?

The Witness: They said so, yes, sir.

By Mr. Conway:

Q. By using the word "indicated," you mean to say for the record that they said so? A. They said so, and I might expand that a little bit more, as to the way in which they said so. They gave reasons for preferring that form of rate. They pointed out that they were at that time engaged in similar discussions with another company, the particular company happened to be Northern Natural Gas Company, operating in the adjacent area, and Northern Natural's rate was being revised at that time from the so-called base load excess gas form of rate to the demand and commodity form of rate, somewhat—well, I will have to get into what the staff indicated, it was their suggestion that Northern Natural was adopting that form of rate, and they wanted us to see what we could do. (Excerpt from Transcript of Record, pp. 240-241).

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Chief Presiding Examiner: I wondered, if you want to show that you have not discriminated, I hesitate to exclude

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[1] By Mr. Conway, for Kansas-Nebraska.

[2] By Mr. Ransom, for Kansas-Nebraska.

that, but I wondered if you couldn't show it in some more general and less detailed way by this witness, whatever you have to show.

Mr. Conway: Your Honor, maybe counsel would stipulate.[1]

Mr. Marti: Tell us what you would like to stipulate to.[2]

Mr. Conway: I will make a brief statement, to stipulate to the fact that the city of Hastings power plant has always enjoyed the lowest available rate to industrial customers served by Kansas-Nebraska in the State of Nebraska.

Mr. Marti: Now, as I understand it, the witness has testified that the only three steam plants you serve are Hastings, Grand Island and Riverside?

Mr. Conway: That is correct.

Mr. Marti: I am willing to stipulate, if it is a fact, and I will take your word for it being a fact, that the rate Kansas-Nebraska has always tried to charge Hastings is the same rate that they have charged for gas used at the Grand Island Power Plant, and at the Riverside power plant.

Mr. Conway: Will you stipulate further that those are the lowest industrial rates in existence offered by Kansas-Nebraska to any industrial customer?

Mr. Marti: Direct industrial customer, yes. I will so stipulate. (Excerpt from Transcript of Record, pp. 291-292).

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[1] For Kansas-Nebraska.

[2] For City of Hastings.